

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EUGENE DAVIS,

Defendant-Appellant.

UNPUBLISHED

February 5, 2004

No. 243206

Berrien Circuit Court

LC No. 2001-403444-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of 3 to 8 years in prison imposed on his plea-based conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty in exchange for dismissal of the original charge for delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The applicable statutory sentencing guidelines recommended a minimum term range of 0 to 17 months. The trial court found that substantial and compelling reasons existed to depart from the guidelines. The court noted that defendant possessed more than fifty grams of cocaine while on lifetime probation for a similar narcotics offense¹ and was sentenced to prison for the probation violation. The court stated that the fact that defendant repeated his earlier criminal behavior while on lifetime probation justified, in and of itself, a departure from the guidelines. The court also found that departure was justified in order to avoid returning defendant to the county jail to serve a consecutive sentence in the instant case after he completed his prison term for the probation violation. The court sentenced defendant to 3 to 8 years in prison with credit for twenty-eight days.

¹ In *People v Davis*, Berrien Circuit Court Docket No. 99-404795-FH, defendant was convicted by plea of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and sentenced to lifetime probation. Defendant violated his probation by committing the instant offense. Immediately prior to imposition of sentence in the instant case, the trial court sentenced defendant to 3 to 20 years in prison for the probation violation.

“If the upper limit of the recommended minimum sentence range for a defendant . . . is eighteen months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a). An intermediate sanction does not include a prison term. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, irresistibly grab the court’s attention, and have considerable value in determining the appropriate sentence length. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent without the invalid factors, remand is necessary. *Id.* at 261.

We review for clear error a trial court’s determination that a departure factor exists. *Id.*, at 265. The determination that a factor is objective and verifiable is reviewed de novo as a matter of law, and the determination that objective and verifiable factors were substantial and compelling enough to merit departure from the guidelines range is reviewed for abuse of somewhat limited discretion. *Id.* at 265-266. A trial court may depart from the guidelines range based on an offense or offender characteristic which was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). In determining whether substantial and compelling reasons exist to merit departure from the sentencing guidelines, we give appropriate deference to the trial court’s familiarity with the offender’s circumstances. *Babcock, supra*, at 270.

We affirm defendant’s sentence notwithstanding the fact that the trial court’s stated desire to achieve judicial efficiency did not constitute a substantial and compelling reason for departing from the guidelines. The trial court clearly erred in determining that the goal of achieving efficiency constituted a factor for departing from the guidelines. The goal of achieving efficiency does not irresistibly grab our attention and is not of considerable worth in determining the length of this particular departure. *Id.*, at 258.

Remand is not necessary, however, because we conclude that the trial court would have departed to the same extent regardless of the invalid factor. The trial court’s second stated reason, defendant’s possession of a large amount of crack cocaine while on probation for an earlier narcotics offense, justified its decision to exceed the guidelines. The trial court clearly stated that this factor alone justified an upward departure from the guidelines. While defendant’s status as a probationer and his possession of more than fifty grams of cocaine were separately taken into account by Prior Record Variable 6, MCL 777.56, and Offense Variable 15, MCL 777.45, the guidelines did not collectively account for the fact that defendant was on lifetime probation for a nearly identical narcotics offense. The trial court was entitled to give defendant’s status as a probationer and his possession of more than fifty grams of cocaine enhanced consideration where these characteristics were collectively given inadequate weight by the guidelines. MCL 769.34(3)(b). The trial court did not abuse its discretion by finding that defendant’s peculiar circumstances evidenced a high risk of recidivism and justified departing from the guidelines and sentencing defendant to prison.

Affirmed.

/s/ Jessica R. Cooper

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood